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9 Attorneys for Plaintiff Oplink Communications, Inc.

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION
13

14 OPLINK COMMUNICATIONS, INC.,

15 Plaintiff,

16 v.
17

18 O-NET COMMUNICATIONS
19 (SHENZHEN) LIMITED; MULTIWAVE
DIGITAL SOLUTIONS, INC.;
CHUNMENG WU, AN INDIVIDUAL,

20 Defendants.
21
22

Case No. C 07-4582 (MJJ)

**DECLARATION OF SAM O'ROURKE
IN SUPPORT OF OPLINK'S REPLY
MEMORANDUM IN SUPPORT OF
OPLINK'S MOTION TO STRIKE
DEFENDANTS' AFFIRMATIVE
DEFENSES AND DISMISS THEIR
COUNTERCLAIMS**

Date: November 27, 2007
Time: 9:30 a.m.
Location: Courtroom 11, 19th Floor
Judge: Hon. Martin J. Jenkins

1 I, Sam O'Rourke, declare as follows:

2 1. I am an attorney with White & Case LLP, counsel of record for plaintiff
3 Oplink Communications, Inc. ("Oplink"). I am admitted to practice law before this Court. I make
4 this declaration in support of Oplink's Reply Memorandum in Support of Oplink Communications,
5 Inc.'s Motion to Strike Defendants' Affirmative Defenses and Dismiss Their Counterclaims
6 ("Motion to Strike"). The matters set forth in this declaration are based on my personal knowledge,
7 and if called as a witness I could and would testify competently thereto.

8 2. Oplink filed its Motion to Strike on October 9, 2007. During the pendency of
9 Oplink's motion, I had numerous telephone conversations with counsel for Defendants in an effort to
10 resolve both parties' co-pending motions to dismiss without the need for court intervention.

11 3. Initially, as a courtesy I contacted Heather Mewes, a partner with Fenwick &
12 West LLP and counsel of record in this matter for Defendants, to advise her that, pursuant to the
13 Court's September 21, 2007 "Related Case Order," all pending hearing dates for motions had been
14 vacated. Through various conversations, we were able to agree to stipulate to have both Oplink's
15 Motion to Strike and Defendants' Motion to Dismiss and Motion to Strike, or Alternatively, for a
16 More Definite Statement ("Motion to Dismiss") both heard on November 27.

17 4. During my initial conversations with Ms. Mewes, I suggested that the parties
18 attempt to resolve their co-pending motions without the need for court intervention. I suggested that
19 it might be more efficient to deal with the parties' complaints about the sufficiency of pleadings
20 through the discovery process rather than through motion practice. That offer was rejected.

21 5. In a subsequent conversation with Ms. Mewes, I suggested that both parties
22 compromise on the relief requested in their respective motions and deal with any outstanding issues
23 through discovery. I had a number of conversations with Ms. Mewes in an attempt to reach such a
24 compromise, but defendants were unwilling to accept any arrangement that did not require Oplink to
25 either abandon its claim for willful infringement or to amend its complaint to plead specific facts that
26 Defendants had knowledge of the patents in suit and had the requisite state of mind necessary to
27 prove a claim of willfulness – a position that was not a compromise from the relief sought in
28 Defendants' motion. Despite numerous conversations with Ms. Mewes, the parties were unable to

1 reach a resolution, and it was my understanding that the parties agreed to go ahead with their
2 respective motions.

3 6. On October 30, 2007, I received a voice message from Carolyn Chang, an
4 associate with Fenwick & West LLP and counsel of record in this matter for Defendants. Ms. Chang
5 was not involved in any of my previous discussions with Ms. Mewes.

6 7. When I returned Ms. Chang's call, she asked if Oplink would be willing to
7 stipulate to allow Defendants to file an amended answer that she claimed would address issues
8 raised in Oplink's Motion to Strike. I asked Ms. Chang to send me the proposed pleading so I could
9 review it to determine if it adequately addressed Oplink's concerns. I also asked Ms. Chang if
10 Defendants had a compromise position on what additional information Oplink could provide in an
11 amended pleading to resolve Defendants' Motion to Dismiss without further motion practice. Ms.
12 Chang said she would get back to me.

13 8. Ms. Chang called me a short time later and told me that Defendants' position
14 was that Oplink must either drop its claim for willful infringement and inducement, or provide the
15 level of specificity sought in Defendants' pending Motion to Dismiss. Again, no compromise was
16 offered.

17 9. After reviewing Defendants' proposed amended answer, it was apparent to me
18 that Defendants had made only minor changes to their affirmative defenses that did not adequately
19 address the most important of the concerns raised in Oplink's Motion to Strike. I informed Ms.
20 Chang that I did not think the proposed amendment was adequate. I also told her that I did not
21 believe it would be productive to stipulate to allow Defendants to file an amended pleading because
22 the amendment would not resolve the parties' dispute. Moreover, if an amended pleading were filed,
23 it could upset the existing schedule because the pending motion would no longer refer to the
24 currently operative pleading. I told Ms. Chang that these concerns, coupled with Defendants'
25 unwillingness to offer a compromise on their pending motion, indicated that a resolution could not
26 be reached and it appeared the parties would have to proceed with their motions.

1 10. I have reviewed Defendants' opposition brief to Oplink's Motion to Strike. I
2 am disappointed with the manner in which Defendants' opposition mischaracterizes the discussions
3 between the parties by insinuating that Oplink did not negotiate in good faith. At no time during my
4 discussions with Ms. Mewes or Ms. Chang did either of them suggest that I was not negotiating in
5 good faith. To the contrary, the parties had what I believed to be productive, good faith discussions
6 that simply did not result in a resolution.

7 I declare under penalty of perjury that the foregoing is true and correct. Executed on
8 November 13, 2007, at Palo Alto, California.

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10 _____
/s/ Sam O'Rourke